SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 757

IRVING FEINBERG AND MARK GODFREY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE WOLF,
Counsel for Petitioners.

EMANUEL G. KLEID,
HORACE M. BABBA,
ABRAHAM L. SAINER,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Irving Feinberg and Mark Godfrey, respectfully submit their petitions for a writ of certiorari, to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, which affirmed a judgment of conviction in the United States District Court for the Eastern District of New York, in a case tried by the Hon. Marcus B. Campbell, United States District Judge, and a jury.

History of the Case.

The indictment in this case (Cr. 38514) was filed on November 19, 1941 against the petitioners and H. Vaughan Clarke and Prendergast-Davies Company, Ltd. It contained thirteen counts. Counts 1 to 8, inclusive, and Counts 10 to 12, inclusive, charged the petitioners and the other defendants with devising a scheme and artifice to defraud, and in furtherance thereof, of using or causing the United States mails to be used in violation of Title 18, United States Code, Section 338. Count 9 of the indictment charged the petitioners and the other defendants with the sale of stock in connection with said scheme by the use of the United States mails and means of transportation in interstate commerce, in violation of Title 15, United States Code, Section 77 q (a). Count 13 of the indictment charged the petitioners and the other defendants with conspiring to commit the offenses alleged in Counts 1 to 12, inclusive, in violation of Title 18, United States Code, Section 88.

The petitioners and the other defendants pleaded not guilty on the 1st day of December, 1941.

The trial began March 24, 1943 and continued through April 14, 1943.

During the trial, Counts 2, 5 and 8 of the indictment were dismissed by the Court with the consent of the Government (R. 6).

On April 14, 1943, the jury rendered a verdict of guilty against each defendant, except Prendergast-Davies Company, Ltd., on Counts 1, 3, 7, 10, 11 and 13, and not guilty on Counts 4, 6 and 9. No verdict was rendered as to Prendergast-Davies Company, Ltd. and the indictment against it was dismissed on motion of the Government (R. 6).

On April 22, 1943, petitioner Irving Feinberg, was sentenced to a term of imprisonment for a period of one

year and six months on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of $150 on each of Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of $100 on Count 13. The petitioner, Mark Godfrey and defendant, Clarke, were each sentenced to a term of imprisonment for a period of ninety days on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently and to pay a fine of $150 on Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of $100 on Count 13. Each petitioner stands committed until said fines are paid or otherwise discharged according to law, and without costs (R. 1247-1250).

Notice of appeal was filed by each of the petitioners on the 22nd day of April, 1943. Irving Feinberg was released on bail of $5,000 and Mark Godfrey was released on bail of $2,000 on that date, pending appeal (R. 1545-1547). On the 17th day of May, 1943, the defendant H. Vaughan Clarke, surrendered to the United States Marshal for execution of his sentence and did not appeal.

An appeal was duly taken by the petitioners from the judgments of conviction to the United States Circuit Court of Appeals for the Second Circuit (R. 1509). It was stipulated and agreed between the United States Attorney and the attorney for the petitioners that the original Exhibits 1 to 28, inclusive, Exhibits 31, 36, 37, 44, 54, 61, 126 a, b, c, d, e, and 161, marked in evidence at the trial, need not be printed in the Bill of exceptions and record with the same effect as though complete copies thereof were set forth and made a part thereof; and that, with respect to Exhibits 1 to 28, inclusive, either party may, upon any argument herein in any Court of review, present the original of each of said exhibits; and then, with respect to Exhibits 31, 36, 37, 44, 54, 61, 126 a, b, c, d, e, and 161, three true and correct copies of each of said exhibits shall be filed a part of the transcript of record in the form of a supplementary

volume containing a list enumerating the exhibits therein, which shall be cross-referenced appropriately in the Printed Record (R. 1507).

The Circuit Court of Appeals affirmed the judgments so appealed from on January 31, 1944; and the issuance of the mandate thereunder was stayed, pending this application, by order of the Circuit Court of Appeals for the Second Circuit on February 7, 1944. The opinion of the Circuit Court of Appeals was written by Hon. Learned Hand and was concurred in by all the Judges. Petition for rehearing was filed on February 9, 1944 and was denied, per curiam, on February 14, 1944. The Circuit Court's order for a mandate of affirmance is dated February 16, 1944 (R. 1568-1569).

This petition is filed to obtain a review of the decision of the United States Circuit Court of Appeals for the Second Circuit.

Statement of Facts.

In the summer of 1938, Edwin C. McCullough, the President of the American Beverage Corporation and the owner of the controlling stock thereof, told his Vice-President, Dennis J. Killian, that the liquor business of the corporation was not profitable because of the lack of volume, and that he would like to acquire Prendergast-Davies Company, Ltd., and its sales force (R. 303, 304, 799). American Beverage Corporation was a wholesale liquor distributor and a manufacturer and distributor of carbonated beverages. In the liquor field, American Beverage Corporation and Prendergast-Davies Company, Ltd. were competitors in the New York area. The annual business of Prendergast-Davies Company, Ltd., was between three and one-half and four million dollars (R. 682). Conversations followed with Feinberg, who was the President of Prendergast-Davies Company, Ltd., but no deal

was consummated. Later that year, one Stemmler, who was a director of American Beverage Corporation, informed McCullough that Clarke and Godfrey, who were President and General Manager, respectively, of the Kinsey Distilling Company of Philadelphia, were interested in effecting a merger of the American Beverage Corporation and Kinsey Distilling Company. Thereafter meetings were held by the parties but nothing developed therefrom (R. 808).

Thereafter, Clarke negotiated with McCullough and Stemmler, who represented McCullough, for the purchase of the 72,000 shares of the common capital stock of the American Beverage Corporation, owned and controlled by McCullough (R. 808, 809). As a result of these negotiations, McCullough agreed to sell the 72,000 shares for $250,000 and gave a fifteen day option to Stemmler, dated December 2, 1938 (Government's Exhibit 110). Stemmler, on the same day, assigned this option to Clarke, who in turn, assigned it to Feinberg (R. 810) (Government's Exhibit 81).

Prior to the expiration of this option (Government's Exhibit 110), Clarke arranged with McCullough for a new thirty day option upon the payment of $10,000. On December 15, 1938, McCullough, at the offices of Stemmler, executed and delivered to Clarke an option running to the petitioner Feinberg, President of the Prendergast-Davies Company, Ltd. (Government's Exhibit 113), and received $10,000 (R. 815-818).

On January 14, 1938, Prendergast-Davies Company, Ltd. paid to McCullough Corporation $240,000, the balance of the purchase price for the 72,000 shares of the common stock of the American Beverage Corporation and, thereupon, it acquired title to said stock (R. 852, 853).

At this time, Feinberg and his wife also owned about 80 per cent of the stock of the Graves Companies, which

companies, in the past, had bought considerable whiskey in bulk from the Kinsey Distilling Company. The latter company held warehouse receipts as securities against the whiskies so sold.

On January 17, 1939, the regular annual meeting of the stockholders of American Beverage Corporation was held as provided for in its original By-Laws; and, at this meeting, the 72,000 shares of stock which had been purchased by Prendergast-Davies Company, Ltd. was voted for a new slate of directors consisting of the petitioner Feinberg, an excellent merchandising and liquor man (R. 371, 574, 683), George J. Mintzer, the attorney for Prendergast-Davies Company, Ltd., and a former Assistant United States Attorney for the Southern District of New York, Dennis J. Killian, the Vice-President and a director of the American Beverage Corporation for many years, H. Vaughan Clarke, the President of the Kinsey Distilling Company, the petitioner, Mark Godfrey, General Manager of the Kinsey Distilling Company, Thomas J. Hughes, an officer of Readville Distilleries, Inc. a distilling corporation with offices at Boston, Massachusetts, which had also sold large quantities of liquor to Graves, and Lester Lipschutz, an attorney in the State of Pennsylvania (R. 311, 1272).

At the meeting of the Board of Directors which followed that afternoon, there was submitted a written offer by Prendergast-Davies Company Ltd. in which it offered to American Beverage Corporation all its assets, business and good-will (excepting the 72,000 shares of the common stock of the American Beverage Corporation), together with 81,429 shares of stock of the Graves Companies, in consideration of American Beverage Corporation assuming all the liabilities of Prendergast Davies Company, Ltd. The offer (Government's Exhibit 40) had attached to it a statement of assets and liabilities of both com-

panies as of October 31, 1938. This offer specifically set forth that there was a deficiency between the assets and liabilities but declared that the following items more than made up for that difference; the good will of the business (its sales were near the four million dollar mark); its exclusive agencies for the distribution in the Metropolitan area of stated wines and liquors and of all the Graves products. None of these items was included in the attached statements as an asset.

Feinberg and Mintzer, the latter the counsel of Prendergast-Davies Company, Ltd., both announced that they would neither participate in the discussion of the offer nor vote thereon (R. 1275). The minutes of the meeting show that a complete discussion of the offer was had and all factors carefully weighed. The offer was accepted (Government's Exhibit 43).

In February, 1939, it was ascertained that the Graves Company had lost money in November and December of 1938 and that, therefore, the Graves stock transferred to American Beverage Corporation was worth less than $128,650 which had been the value at which the stock had been taken by American Beverage Corporation. Thereupon, Prendergast-Davies Company, Ltd., through Feinberg, offered to turn over to American Beverage Corporation the 72,000 shares of American Beverage Corporation as collateral security to protect it against any loss on that account. An agreement was then prepared by the law firm of Breed, Abbot and Morgan, acting through Mr. Charles H. Tuttle and on behalf of American Beverage Corporation, providing for such security. The stock was turned over to American Beverage Corporation, pursuant to such agreement (R. 362-365).

The Board of Directors of American Beverage Corporation in the meantime, had appointed a committee to visit the Graves' plant and bring back a report about its

situation. This report was delivered to the Board on February 14, 1939. It showed that the overhead of the Graves Company was too high; that it could increase the volume of its business to the necessary amount if it had more cash; that the plant was in good condition and valuable; that it had spent $250,000 in advertising, too much money for finance charges and for carrying some real property. The value as at December 31, 1938 was stated by the firm's accountants to be approximately 72,000, exclusive of its goodwill (Government's Exhibit 50).

On February 14, 1939, Feinberg resigned as President of American Beverage Corporation; on September 11, 1939 he resigned as a director thereof; in November, 1940, he completely severed all connections therewith, while Prendergast-Davies Company, Ltd. at the same time released all its right, title and interest in and to the 72,000 shares of stock which had been deposited as collateral (R. 1314, 381, 382), Godfrey remained as a director until January 17, 1940.

It is the contention of the Government that the defendants schemed to defraud American Beverage Corporation and its minority stockholders through a plan which provided for Feinberg to persuade the creditors of Prendergast-Davies Company, Ltd. not to press their claims and, in this way, build up a large bank deposit which could be used for the purchase of the control stock of American Beverage Corporation. Thereafter, he was to elect directors who were to approve the plan providing for the purchase by American Beverage Corporation of Prendergast-Davies Company, Ltd. and the control of Graves in exchange for the assumption of the Prendergast-Davies Company, Ltd.'s liabilities of about $900,000. The fraud was alleged to lie in the fact that the value of the property received by American Beverage Corporation was much less than the amount of liabilities assumed. That

issue was hotly contested. The defense claimed that it had openly stated that tangible property was less than the liabilities of Prendergast-Davies Company, Ltd. but that the deficiency was more than made up by the value of the good-will. The Government maintained that since both Prendergast-Davies Company, Ltd. and Graves had recently been losing money, there was not any good-will, despite the volume of business being done, the past profitable records of Prendergast-Davies Company, Ltd. and Graves, their valuable contracts and the existing reasons for losses, to wit: price wars, and high advertising expenses.

It is the contention of the petitioners that there was no criminal intent on their part; that they acted in good faith throughout the transactions; that in January, 1939, at the time when the purchase of the American Beverage Corporation stock was consummated, American Beverage Corporation received at least as much as it paid; that the plan of the petitioners was to merge the companies involved so as to have their combined business operate under an overhead of one company; that the issues were so close that, in the words of the Circuit Court of Appeals the "jury might have decided either way" (R. 1554). Therefore, errors at the trial which created prejudice, bias, and an unwarranted picture of the petitioners became so serious that the conclusion must be reached that there was a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

The Questions Presented.

1. Were the actions, conduct and methods employed and statements made by the Prosecuting Attorney so prejudicial to the petitioners' right to a fair trial as to call for the exercise of the power of supervision of this Court?

2. Did the admission of the annual reports of the American Beverage Corporation for the fiscal periods ending November 30, 1939 and November 30, 1940, respectively, constitute such error as to prejudice the rights of the petitioners to a fair trial?

3. Were the books of Prendergast-Davies Company, Ltd., the Graves Companies and the American Beverage Corporation properly admitted in evidence?

Reasons for Granting Petition.

(a) The Prosecuting Attorney, during the course of the trial and in his closing address, maliciously and unjustifiably linked the petitioners with a notorious gangster and racketeer by the name of John Torrio.

(b) The Prosecuting Attorney, in his opening address, stated that petitioner Feinberg, at some other time had violated the laws relating to distilled spirits and that petitioners had concealed that fact from the stockholders of American Beverage Corporation and repeated the same in his closing address, despite the fact that there was no proof thereof and the petitioners had not taken the stand.

(c) That in his closing address, the Prosecuting Attorney referred to certain adverse newspaper publicity relating to some other indictment of Feinberg in a manner calculated to convey to the jury the impression that the petitioners had suppressed that fact from the stockholders of American Beverage Corporation, whereas, in truth, such indictment had been found after the completion of the alleged scheme and all of which formed no part of the testimony.

(d) That the Circuit Court of Appeals, in its opinion, showed that it had been misled as a result of these remarks by the Prosecuting Attorney when it stated that the com-

ments of the Prosecuting Attorney "would have been improper if the (newspaper) articles themselves had been incompetent; but, as they were not, no harm was done" (R. 1556). Since the articles which referred to an indictment found subsequent to the alleged scheme herein obviously would be inadmissible, the quoted language of the Circuit Court of Appeals emphasized the misapprehension of that Court concerning the seriousness of the error.

(e) The Prosecuting Attorney, in his summation, indicated to the jury, by his conduct and words, that he was quoting from actual testimony, whereas his quotations blackening the motives of petitioners, did not come from the testimony but were misquotations and misstatements concerning such testimony.

(f) The Circuit Court of Appeals stated, in its opinion, that the closing address of the Prosecuting Attorney was vulgar, in bad taste and violent.

(g) The admission of the annual reports of American Beverage Corporation for the fiscal periods ending November 30, 1939 and November 30, 1940 were error and calculated to convey the impression to the jury that the business losses of American Beverage Corporation after the new Board of Directors, of which petitioners were members, was elected, were the result of illegal and wrongful acts by the petitioners. The Circuit Court of Appeals conceded this admission of the statement of 1940 to be error but concluded that it would be unwarranted to reverse because of so trifling a single lapse. The books offered in evidence as the books and records of the Graves Companies, American Beverage Corporation and Prendergast-Davies Company, Ltd. were the books and records of those companies; and if there was no such stipulation, no proper foundation had been laid by the Government for their admission, and so

they were not admissible. The Circuit Court, in its opinion, stated that the computations taken from such books were "a vital part of the case, and that they were incompetent, unless the books themselves were competent" (R. 1557). The Circuit Court stated that there was such a stipulation and erroneously interpreted the words of counsel to arrive at such conclusion.

It is respectfully submitted that the issues were so closely contested, the question of intent so finely balanced, the value of assets, tangible and intangible, so dependent upon the character and motives of the petitioners, that the cumulative effect of the errors affecting these matters resulted in depriving the petitioners of a fair trial and warrants the exercise of this Court's power of supervision and a review of the judgments.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding the said Court to certify the case to this Court for review and determination, as provided by the statutes of the United States; and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

Dated: City of New York, New York, March —, 1944.

GEORGE WOLF,
Attorney for Petitioners.

EMANUEL G. KLEID,
HORACE M. BARBA,
ABRAHAM L. SAINER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 757

IRVING FEINBERG AND MARK GODFREY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The indictment in this case (Cr. 38514) was filed on November 19, 1941 against the petitioners and H. Vaughan Clarke and Prendergast-Davies Company, Ltd. It contained thirteen counts. Counts 1 to 8, inclusive, and Counts 10 to 12, inclusive, charged the petitioners and the other defendants with devising a scheme and artifice to defraud, and in furtherance thereof, of using or causing the United States mails to be used in violation of Title 18, United States Code, Section 338. Count 9 of the indictment charged the petitioners and the other defendants with the sale of stock in connection with said scheme by the use of the United States mails and means of transportation in

interstate commerce, in violation of Title 15, United States Code, Section 77 q (a). Count 13 of the indictment charged the petitioners and the other defendants with conspiring to commit the offenses alleged in Counts 1 to 12, inclusive, in violation of Title 18, United States Code, Section 88.

The petitioners and the other defendants pleaded not guilty on the 1st day of December, 1941.

The trial began March 24, 1943 and continued through April 14, 1943.

During the trial, Counts 2, 5 and 8 of the indictments were dismissed by the Court with the consent of the Government (R. 6).

On April 14, 1943, the jury rendered a verdict of guilty against each defendant, except Prendergast-Davies Company, Ltd., on Counts 1, 3, 7, 10, 11, 12 and 13, and not guilty on Counts 4, 6 and 9. No verdict was rendered as to Prendergast-Davies Company, Ltd., and the indictment against it was dismissed on motion of the Government (R. 6).

On April 22, 1943, petitioner Irving Feinberg was sentenced to a term of imprisonment for a period of one year and six months on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of $150 on each of Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of $100 on Count 13. The petitioner, Mark Godfrey, and defendant, Clarke, were each sentenced to a term of imprisonment for a period of ninety days on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of $150 on Counts 1, 3, 7, 10, 11 and 12 and to pay a fine of $100 on Count 13. Each petitioner stands committed until said fines are paid or otherwise discharged according to law and without costs (R. 1247-1250).

Notice of appeal was filed by each of the petitioners on the 22nd day of April 1943 (R. 1509-1512). Irving Fein-

berg was released on bail of $5,000, and Mark Godfrey was released on bail of $2,000 on that date, pending appeal. On the 17th day of May, 1943, the defendant H. Vaughan Clarke surrendered to the United States Marshal for execution of his sentence and did not appeal.

An appeal was duly taken by the petitioners from the judgments of conviction to the United States Circuit Court of Appeals for the Second Circuit (R. 1509). Among the errors assigned are those which are argued in this brief and set forth in the petition herein.

The Circuit Court of Appeals affirmed the judgments so appealed from on January 31, 1944; on February 7, 1944, the issuance of the mandate thereunder was stayed, pending this application, by order of the Circuit Court of Appeals for the Second Circuit. The opinion of the Circuit Court of Appeals was written by Hon. Learned Hand and was concurred in by all the Judges.

Petition for Rehearing was filed on February 9, 1944, and was denied, per curiam, on February 14, 1944 (R. 1568).

The Circuit Court's order for a mandate of affirmance is dated February 16, 1944 (R. 1569).

ARGUMENT.

Point I.

The prosecuting attorney, during the course of the entire trial, made highly unfair, improper, prejudicial and inflammatory statements, by reason of which the petitioners did not receive a fair trial.

From the time the indictment was found through the summation of the Prosecuting Attorney, attempts were made to give the business transaction of these petitioners an unjustifiably vicious background.

A. The indictment, in paragraphs "7" and "8" (R. 11) declare that Prendergast-Davies Company, Ltd., was a cor-

poration "organized by John Torrio, alias John T. McCarthy, in 1933," and then went on to say that "In June of 1935, Irving Feinberg (petitioner) and his wife, Anne Feinberg, acquired from John Torrio, alias John T. McCarthy, the ownership and control of Prendergast-Davies Company, Ltd.

The said John Torrio is a notorious gangster and a criminal of the worst type. His name has been spread over all the newspapers in the country many times, particularly in New York City, *and even during the course of the trial* (Exhibits "A" and "B" of April 22, 1943, R. 1505, 1506).

Defense counsel specifically warned the Prosecuting Attorney, at the outset of the trial out of the presence of the jury, not to refer to John Torrio because it has "absolutely no connection with this case whatsoever" (R. 58).

During the examination of the Government witness Jacobs, the Prosecuting Attorney elicited information as to the former ownershp of Prendergast-Davies Company, Ltd., again solely for the purpose of bringing Torrio's name before the jury and so that he might, thereafter, comment upon it in his closing address. Defense counsel promptly moved for a mistrial. (R. 454, 455, 456).

It again became necessary for defense counsel to move for a mistrial when the Government counsel, in cross-examining the petitioner's witness Stempf, asked the following question and made the following statement (R. 1139, 1140):

> "Q. Suppose the management as it then was in 1934 and 1935 had some peculiar power over the people that were in the liquor business, that he could exact the profit that he wanted, wouldn't that be an important factor?
>
> Mr. Kleid: I object to that. There is no such testimony in the record.

Mr. Rubin: All we have in this record, your Honor please, is that in 1934 and 1935 Prendergast-Davies Company was run by John Torrio.

* * * * * * *

Mr. Kleid: There is no such testimony in the record."

It is apparent that the Government attorney worded his question and made the statement above quoted, so as to convey to the jury that Torrio, allegedly in control of Prendergast-Davies Company, Ltd., used racketeering methods in operating that corporation prior to 1935 and that the petitioner, Feinberg, succeeded him and had an association with him.

Despite the complete lack of evidence that Torrio operated Prendergast-Davies Company, Ltd., in 1934 and 1935 with "peculiar power over the people," (which implied the use of racketeering methods in the operation of said business), the Government counsel, in his summation, once more linked Feinberg with this notorious gangster and racketeer and stated that the said John Torrio was associated with Prendergast-Davies Company, Ltd., in 1934 and 1935 and operated that company. It should be noted that there is no testimony that Torrio had any connection with Prendergast-Davies Company, Ltd., at any time and it is conceded that Feinberg was not in the company before August, 1935.

With respect thereto, the Government counsel made the following statement in his summation:

(R. 1172) " * * * There was a man by the name of Torrio; he was running the P-D Company. He wasn't doing at all badly back in 1934 and 1935. There was a profit, a good profit, * * * And this fellow Torrio, he had something. He ran a business; he made a profit. I wasn't going to go into that, but they offered that contract here; they put that contract

in, between Slockbower and somebody else; but the real guy was Torrio, not Slockbower. And it showed how they did it. And this is what they did. Torrio wanted to get out of the business for reasons that he had, and he said 'O. K. Have you got the money to buy me out?' Feinberg didn't have the money. He said, 'I will tell you what. I will put up $30,000 out of the grand total of some $300,000, whatever it is.'

And the way they worked it was that Torrio just lifted out all his working capital, some $250,000; he lifted it right out of there and left the shell for Feinberg. They had volume, that's right. Torrio built up the volume in 1934 and 1935 * * *."

The seriousness of the error is even more apparent as to the petitioner Godfrey, for he never had any association or other connection with Prendergast-Davies Company, Ltd. and hence none with Torrio.

The District Court recognized that serious error had been committed in permitting comments about Torrio by the United States Attorney, but it did nothing to correct these errors except to omit the reference to Torrio contained in paragraphs "7" and "8" of the indictment, when he read the indictment to the jury during his charge and then, merely to say:

(R. 1198): "I have omitted some of that because it was not proven and there is no reason for dragging it in."

The Circuit Court's comment, in its opinion, was that "it was purest speculation whether any of the jury knew that Torrio was a notorious lawbreaker" (R. 1560) and that the remarks of the Prosecuting Attorney were "unhappy vulgarisms" (R. 1560). Its conclusion was:

(R. 1556): "It may be that the prosecution brought this out in the hope that some scandal might attach to Feinberg, but the chance that it succeeded is very tenuous."

These conclusions deny to the jury awareness of news spread over the front pages of Metropolitan newspapers on many occasions over a period of many years and overlook the possible effect of those remarks upon the jury. (See R. pages 1505, 1506 for articles referrring to Torrio published during the course of the trial.)

B. The Prosecuting Attorney, in his opening address, read from paragraph "27" of the indictment which alleged that the petitioner, Feinberg, had violated the laws relating to distilled spirits and that the petitioners concealed that fact from the stockholders of American Beverage Corporation. The Prosecuting Attorney knew, when he made that statement, that Feinberg had been indicted in *February, 1939,* charged with violating the laws relating to distilled spirits, for acts which took place seven years previously and that that indictment had been found after the alleged fraud in the instant case was completed; and he also knew that he had pleaded nolo contendere to one count of said indictment on *May 1, 1939,* and sentenced to pay a fine. During the course of the trial the Court ruled, out of the presence of the jury, that the Prosecuting Attorney would not be allowed to offer testimony relating to the aforesaid indictment and plea of Feinberg because it related to an indictment and plea which had occurred subsequent to the alleged fraud in the instant case and not prior thereto.

Furthermore, the prosecutor knew that he could not prove that the petitioners had knowledge, prior to February, 1939, that Feinberg was *about to be* indicted.

On February 6, 1939, there appeared in the newspapers an article to the effect that an indictment had been filed in the United States District Court for the District of Connecticut charging Feinberg with violation of the laws relating to distilled spirits. This was the first time the petitioners knew or could have known about such an indict-

ment and, therefore, they could not very well suppress what they had not known. Shortly after Feinberg's nolo contendere plea, and in due course, the Federal Alcohol Administration, the body in charge of the issuance of wholesale liquor permits, was notified.

Despite these facts, the prosecutor, in his closing address, referred to this newspaper article, which was not in evidence and which he could not put in evidence, and told the jury that Feinberg had been "caught in some wrongdoing."

> (R. 1159, 1160): "They worked out this deal and they thought they had it, they were sitting pretty, and then something happened. Something came out. It was adverse publicity. It was in the newspapers—and I haven't been permitted to prove what that was—but never mind what it was. It was adverse publicity, and it was bad, it was serious * * *
>
> And they demanded Feinberg do something about it. When that happens, adverse publicity, whatever that was, I am not allowed to tell you, when that happened, the cat was out of the bag; the fat was in the fire; * * * The fat was in the fire. They were scared stiff. They were caught, and so they scrambled around and they tried to get out from under; * * *
>
> * * * They caught Feinberg in something; he had made misstatements."

The Circuit Court of Appeals, in its opinion, completely missed the significance of the newspaper article. It mistakenly assumed that it "censured the purchase by A. B. C. of the P-D assets and the Graves shares," (R. 1556) and that because of that article the accused "were much troubled by the attack upon the transaction" (R. 1556). From this it drew the conclusion that the articles were competent and that "no harm was done" (R. 1556). If that Court had correctly understood the import of the article, it might have changed the entire attitude of the Court, in view of the heaping of error upon error in so close a case. The Circuit

Court conceded that the method of the Prosecuting Attorney was "improper if the articles themselves had been incompetent," (R. 1556) and clearly they were incompetent.

C. The Government attorney, in his closing address, told the jury that he "went over the record during the week-end and picked out bits of evidence, here and there, from the record," and "put the pages down, and made notes;" and that he "was going to give them the evidence in the case, not talk, not generalization, and not his recollection" (R. 1153, 1186).

At this point, Government counsel placed on the table in front of the jury, the transcribed testimony of witnesses in order to impress the jury that what he was saying was taken directly from the record (R. 1186).

Connolly's Testimony.

Connolly was a minority stockholder of American Beverage Corporation who attended the annual meeting of the American Beverage Corporation stockholders on January 17, 1939.

The Government counsel misquoted Connolly's testimony when he stated that he (Connolly) said:

> (R. 1155) "* * * 'Well, they told me that they were not going to pay Feinberg any salary; he didn't need a salary; he is a wealthy man. He is only interested in the company; he didn't need a salary.' * * * They said they were not going to give him a salary; * * *"
>
> (R. 1161) "* * * That is the record; it is in there. And what Connolly stated to you about how they said to him about Feinberg not getting a salary. That is in the record; it is uncontroverted."
>
> (R. 1171) "* * * Connolly said Feinberg didn't want the salary * * *"

Whereas, Connolly testified, as follows:

> (R. 431) "Q. Was it stated to you or anybody else at that meeting in your presence that the board of directors, the new board would right after that vote Mr. Feinberg a $30,000 salary? * * *
> A. No."

As to Mintzer.

The Government counsel stated:

> (R. 1163) "My goodness, they know what this thing is. Mintzer was fed up; he got out. I don't blame him. * * *
> He (Mintzer) finds out about that, and he gets all excited. 'Give us an indemnity.' And he made Feinberg put up 10,000 of these shares. And he is getting a little leary of this guy Feinberg at that point, * * *"

The fact is that Mintzer did not testify at all and there was no such testimony with respect to Mintzer.

The Circuit Court of Appeals recognized that the conduct of the Prosecuting Attorney exceeded proper bounds, but disregarded its effect by saying that it "was within the regrettable latitude which has long been common" (R. 1560).

The question is not whether the jury convicted because of the prejudice created by the Prosecuting Attorney, but rather whether because of it the accused were deprived of their right to an impartial trial.

> See *United States* v. *Vierick*, 318 U. S. at 247;
> *People* v. *Malkin*, 250 N. Y. at p. 200;
> *United States* v. *Berger*, 295 U. S. at p. 88.

Point II.

The fiscal reports of the American Beverage Corporation for the years ending November 30, 1939 and November 30, 1940 were improperly admitted and seriously prejudiced the rights of the petitioners.

These reports contained the balance sheet and profit and loss statement of the company covering the two year periods following the purchase by Prendergast-Davies Company, Ltd. of the controlling stock of American Beverage Corporation. The prosecutor admitted that he was not charging the petitioners with losses sustained by the company in its operation; but, despite that declaration, his obvious purpose was to create the impression that the petitioners had obtained control of American Beverage Corporation in order to milk the company for their own personal benefit. His remarks in his summation were very serious in their effect. The following appears:

> (R. 1157) "* * * The stockholders of this company left their money in charge of reputable people whom they knew, and nothing went wrong with it up to then. They came, this pack of wolves moved in here and started cutting the heart out of the company, just like letting a wolf loose in a nursery."

The Circuit Court of Appeals, in its opinion, stated flatly that the admission of these reports was error but refused to give them its full effect by these words:

> (R. 1559). "True, we cannot say that its admission could have done the accused no damage * * * yet it would be wholly unwarranted to reverse the conviction because of so trifling a single lapse in the course of so long a trial."

But, what is overlooked by the Circuit Court of Appeals is that this was not a single lapse. The unfair conduct of

the Prosecuting Attorney in the instances above set forth (and others too numerous to mention here), prejudicing the petitioners as it did, taken together with the fact that American Beverage Corporation lost money during 1939 and 1940 might well have turned the minds of the jury to thinking that those losses were the result of deliberate wrongful acts of these petitioners, rather than losses because of business conditions which, admittedly, were no fault of these petitioners.

It should also be added that neither of these petitioners was a director or officer of American Beverage Corporation during the year 1940.

Point III.

The books of the Company were improperly admitted.

When the books were first offered for identification by the Government counsel, it was clearly stated by the petitioners' counsel that they had no objection to the same being marked for identification.

> (R. 85, 86). "Mr. Rubin. If your Honor pleases, we have a large number of books and records of the three companies that are involved in this case. To save time, I would like to offer for identification the books that are on the table there, of which I have in my hand a list, with the understanding that they will be numbered consecutively for identification, and that the books and records will be marked during the recess tomorrow, so as to save the time of the Court and the jury and of counsel. Is there any objection to that?
>
> Mr. Kleid: What books are they?
>
> Mr. Rubin: They are the books of C. H. Graves & Sons Company, C. H. Graves & Sons Distillers, Inc., Prendergast, Davis Company, Ltd., and American Beverage Corporation.
>
> Mr. Kleid: *Are these only for purposes of identification?*

Mr. Rubin: That is what I stated, Mr. Kleid.

Mr. Kleid: I just wanted to be clear on that; no offense. For the purposes of identification, I have no objection, provided these are all the books of the companies; I don't know.

The Court: If not, you can put in others if you want to.

Mr. Kleid: I do not know where they are.

Mr. Rubin: If your Honor pleases, I now suggest to counsel that they may wish to stipulate that these books and records, as reflected on this list which I will hand to counsel, are the books and records so indicated of those companies, subject to verification; the books and records will be in court; they will be available and they can be verified.

Mr. Kleid: I have no objection to these books being marked for identification. *I am not familiar with these books, and, therefore, I am in no position to state now that these are the books of the company or all the books of the company, but for the purpose of this trial, I have no objection to their being marked for identification.*

Mr. Rubin: If your Honor pleases, I am asking counsel whether counsel will stipulate——

The Court: If you want him to stipulate, talk to him, but the jury is not concerned with this.

(Discussion off the record.)

Mr. Rubin: Counsel advises me it is stipulated that those are the books of the companies on this list, subject to verification.

The Court: And it is not necessarily all of the books.

Mr. Rubin: Those on the list."

Thereupon, Government counsel handed to the Court Clerk a typewritten list of said books. When the Government counsel stated that it had been "stipulated that those are the books of the companies on this list, subject to verification" (R. 86), those words could only mean subject to Government counsel going forward with the

burden, i.e., showing that those were the books of the companies, and that the entries therein were made in the regular course of business.

Although these books were offered for identification at the outset of the trial, neither they nor figures therefrom were used by the Government counsel until two weeks later when he examined the Government's accountant relative to said books. It was then that the petitioners' counsel objected to his testifying unless the books were first in evidence; and then, for the first time, the Government counsel offered the books in evidence and objection was made to their admissibility, not solely upon the ground, stated by the Circuit Court, "that it had not been shown that the books had been kept in the regular course of business" (R. 1557), but, as well, on the ground that it had not been shown that these were the books of the respective companies.

> (R. 912, 913) "Mr. Kleid: We object to it on the ground that unless testimony is offered here to the effect that these books were kept in the regular course of business and are the books of the respective companies, they are inadmissible."

The Circuit Court of Appeals, in its opinion, correctly stated "that these computations were a vital part of the case, and that they were incompetent, unless the books themselves were competent" (R. 1557). The interpretation put upon language of counsel by the Circuit Court had no basis in law or in fact.

It is to be noted that the Circuit Court, in reaching its decision that the books of Prendergast-Davies Company, Ltd. and the Graves Companies were admissible against Mark Godfrey, stated that Godfrey had helped in the preparation of the offer submitted to American Beverage Corporation by Prendergast-Davies Company,

Ltd. (R. 1559). However, there is not a scintilla of evidence in the record to support a conclusion and hence, as to Godfrey, the error was even more prejudicial.

POINT IV.

The writ of certiorari should issue.

Respectfully submitted,

GEORGE WOLF,
Attorney for Petitioners.

EMANUEL G. KLEID,
HORACE M. BARBA,
ABRAHAM L. SAINER,
Of Counsel.

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CITATIONS

580826—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 757

IRVING FEINBERG AND MARK GODFREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1552–1560) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 16, 1944 (R. 1569), after a petition for rehearing (R. 1561–1567) had been denied on February 14, 1944 (R. 1568–1569). The petition for a writ of certiorari was filed on March 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Rules

of Criminal Procedure promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the alleged misconduct of the prosecuting attorney constituted prejudicial error.

2. Whether the trial court erred prejudicially by admitting in evidence the fiscal reports of the American Beverage Corporation for the fiscal years ending November 30, 1939, and November 30, 1940.

3. Whether the proper foundation was laid for the reception in evidence of the books of the corporations involved.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695) provides:

> * * * in any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. * * *

STATEMENT

In a thirteen-count indictment (R. 9–55), returned in the District Court of the United States for the Eastern District of New York, petitioners together with H. Vaughan Clarke and Prender-

gast-Davies Company, Ltd., were charged in counts 1–8 (R. 9–41) and 10–12 (R. 45–51) with violations of the mail-fraud statute (18 U. S. C. 338), in count 9 (R. 41–44) with a violation of Section 17, Title I, of the Securities Act of 1933 (15 U. S. C. 77q), and in count 13 (R. 51–55) with a conspiracy to commit the substantive offenses charged in the prior counts. With the consent of the Government counts 2, 5, and 8 were dismissed, for lack of proof of the mailings charged in those counts (R. 6, 1114–1115, 1196). The individual defendants were acquitted by the jury on counts 4 and 6, and on count 9 (the count charging a Securities Act violation), but were found guilty on counts 1, 3, 7, 10, 11, and 12 of the mail fraud counts and on count 13 charging conspiracy (R. 6, 1237–1240).[1] Petitioner Feinberg was sentenced to imprisonment for a year and six months on each count, the sentences to run concurrently, and also to pay fines totalling $1,000 (R. 7, 1247–1248). Petitioner Godfrey and the defendant Clarke were each sentenced to imprisonment for ninety days on each count, the sentences to run concurrently, and also to pay fines totalling $1,000 (R. 7, 1249–1250). Clarke has not appealed. On appeal by petitioners to the United States Circuit Court of Appeals for

[1] No verdict was returned as to Prendergast-Davies Company, Ltd. (R. 6), and as to it a *nolle prosequi* was entered on April 22, 1943 (R. 7).

the Second Circuit, their convictions were affirmed (R. 1552–1560, 1569).

Petitioners do not here challenge the sufficiency of the evidence to sustain their convictions, but base their petition for certiorari entirely upon alleged misconduct of the prosecutor and alleged errors in the admission of evidence (Pet. 9–12, 15–27). In order, however, to appraise the challenged conduct and evidence in their proper setting, we shall set forth, as briefly as possible, the nature of the charges against petitioners and the evidence adduced in support thereof.

The conspiracy and scheme to defraud charged against petitioners consisted, briefly, in the acquisition of the controlling shares and directorate of a financially sound corporation, in which they had no prior financial interest, for the purpose of effecting a *de facto* merger with two failing corporations, at a false and inflated valuation of their assets, to the benefit of petitioners' interests in the latter corporations but at the expense of the first corporation's other shareholders. As will be shown (*infra,* pp. 12–18), no disclosure of the true facts was to be or was made to such other shareholders or to anyone representing them; instead, specific misrepresentations were made.

In the fall of 1938 petitioner Feinberg and his wife were the sole owners of Prendergast-Davies Company, Ltd. (hereinafter referred to as P–D), which was engaged in the wholesale liquor business in New York (Gov. Ex. 30, R. 1251–1252;

Gov. Ex. 119, R. 1384–1385). They also owned 81½ percent of the shares of C. H. Graves & Sons Distillers, Inc. (R. 135, Gov. Ex. 30, R. 1251). Apart from $144 in cash and the $100 note of an officer, the only assets of the latter company as of October 31, 1938, were the shares of its wholly owned subsidiary, C. H. Graves & Sons Company (R. 902), which was engaged in the liquor rectifying and distributing business in Boston (Gov. Ex. 123, Ex. Vol. 91). Since the parent-subsidiary relation of the two Graves companies is in no way material to the case, they will hereinafter be referred to as one company and designated "Graves." The Feinbergs had acquired P–D and Graves between 1932 and 1935 (R. 447–460).

In the fall of 1938 both companies were in straitened financial circumstances. Their sales had been financed since around 1935 by Walter E. Heller & Company of Chicago (R. 639), which was engaged in the business of "the furnishing of working capital to companies who are doing a business beyond what their own capitals will permit them to do" (R. 643). A report dated September 16, 1938, prepared by representatives of the Heller Company, showed that between August 31, 1937, and July 31, 1938, the working capital of P-D had decreased from $100,672.55

to $28,332.77;[2] that as of the later date "for every dollar's worth of working capital they had, they owed about $19.68 in obligations"; that sales were decreasing; that a large sum in notes payable was past due; and that "if the present rate of losses continued, the surplus [$18,000 as of July 31, 1938] would be dissipated" (R. 661–662). On the basis of this report Feinberg stated to Heller in September 1938 that if the condition of P-D could not be rectified "he would close shop and put what remained of his capital into the Graves picture and go back to Boston" (R. 665; see also R. 648). In the first five months of 1938, Graves had sustained operating losses totalling over $26,000 (R. 657, 659), and the downward course continued at a rapid rate (R. 656). Graves' net loss for the entire year of 1938 was $123,127 (R. 903). In April and May of 1938 Feinberg discussed ways of improving the situa-

[2] Government witness Herrick, the New York representative of Walter E. Heller & Company, testified that the decrease in working capital resulted in part from "certain advances that Mr. Feinberg had received from the Prendergast-Davies Company during the 30 or 45-day period just preceding the middle of February; and it was explained to us at the time that the advances that Mr. Feinberg had received from Prendergast-Davies Company had been used by him to pay an obligation that was owing to a man in Boston who at one time had owned some stock in the Graves Company, and which stock had been purchased by Mr. Feinberg" (R. 658–659). It was pointed out to Feinberg at the time "that if that trend continued, the company might find itself in difficulty financially" (R. 659).

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tion with representatives of the Heller Company (R. 648, 652–653). It was recognized that if the losses continued "the company would very quickly reach a breaking point" (R. 661). An attempt was made to secure an abatement of a large amount of tax arrears owing the State of Massachusetts, in view of the "possibility of the plant having to close down and thereby throw a number of employees out of work" (R. 653). It was also suggested that operating expenses be cut down, but no headway was made in this direction (R. 656). Late in May the Heller Company learned that, despite the previous discussions of curtailing expenses, Feinberg's own salary had been increased (R. 657–658). The continued losses were discussed with Feinberg down to the close of 1938 (R. 669).

Petitioner Godfrey and the defendant Clarke were, respectively, the president and general manager of Kinsey Distilling Corporation of Philadelphia, and were vitally concerned with the preservation of Graves as a distributor of Kinsey products (R. 135, 236, 762; Gov. Ex. 30, R. 1251–1255; Gov. Ex. 83, R. 1350–1354). From early in 1938 they collaborated with Feinberg in an effort to save P–D and Graves (R. 764, 772). Godfrey repeatedly discussed with Blass, Kinsey's banker and co-trustee for the financing of the sale of Kinsey whiskey under contract, the capital requirements of P–D and Graves and the sales of Kinsey whiskey to Graves (R. 768, 775).

The American Beverage Corporation (hereinafter referred to as ABC) operated in New York as a manufacturer of soft drinks and distributor of alcoholic beverages (R. 112–113). As of November 30, 1938, it had a surplus of $457,126.47, current assets of $986,086.81 [3] as compared with current liabilities of $334,529.42, and net earnings of $24,936.38, after taxes, for the fiscal year just closed (Gov. Ex. 36; Ex. Vol., pp. 15–18). Of its 135,760 common shares outstanding, 72,000 were owned by its president, McCullough (R. 797). At all material times these shares constituted control of the corporation,[4] the other shares being distributed among the public (R. 797).

In the summer of 1938 Feinberg suggested to McCullough, without success, a merger of ABC with P–D [5] (R. 795, 797, 798–799). McCullough offered $120,000 for the assets of P–D provided an independent audit showed that to be their net worth (R. 795–797). The deal fell through because McCullough refused to take Feinberg as manager of the liquor department of ABC at $25,000 a year, as Feinberg demanded (R. 796, 828). McCullough told Feinberg that he "didn't

[3] Inventory was conservatively carried at the lower of cost or market (Gov. Ex. 36; Ex. Vol., p. 17).

[4] The preferred shares were entitled to vote only in the event of the omission of eight regular preferred dividends, a condition that had not occurred (R. 277).

[5] Petitioners' statement of facts would indicate (Pet. 4) that the initiative was with McCullough, who testified, however, directly to the contrary (R. 797).

like the method of business that they pursued down there [at P–D], and I didn't want to run my business on the lines that he ran that" (R. 829). McCullough also rejected a proposal made to him by Godfrey and Clarke for a merger of ABC with Kinsey (R. 806–807), but stated, in response to their suggestion that they purchase his shares in ABC, that he would sell them for $250,000 cash (R. 808–809).

Feinberg, Godfrey, and Clarke decided to acquire McCullough's shares (R. 615–616). Feinberg sought to borrow the needed $250,000 from the Heller Company, offering as security the ABC shares to be purchased with the money, and stating that he would personally get $250,000 from ABC in exchange for P-D's assets, which sum he would turn over to the Heller Company in repayment of the loan (R. 670–671). The Heller Company was deterred by the "hazards in the direction of minority stockholders" which were pointed out to Feinberg (R. 671), who replied that he "would seek some other means of trying to consummate the deal" (R. 671–672). Godfrey discussed the matter with Blass,[6] who suggested "as a first step, a complete audit of the various companies involved" (R. 774–775) and told Godfrey that this should be an independent audit (R. 777). On November 21, 1938, Blass, Godfrey,

[6] Godfrey also wrote Blass at about the same time that "Irving [Feinberg] is doing nothing that I do not know of" (Gov. Ex. 100; R. 1363).

and Feinberg discussed the matter of an audit with Marshall N. Thomas (R. 92–94, 774–775), but Thomas' firm was never authorized to make an audit (R. 107) and an independent audit was never made. Blass also referred Godfrey to one Rosenbaum, who was told by Clarke and Godfrey on January 4, 1939, that they no longer needed a loan to acquire ABC—that they had made other arrangements (R. 870).

On December 2, 1938, petitioners had secured from McCullough an option, renewed on December 16 by the posting of a $10,000 forfeiture, for the purchase of his 72,000 shares in ABC for $250,000 (R. 809, 815–816). In the meantime Feinberg arranged with two of the suppliers [7] of P-D "to permit their obligations to be carried on beyond their normal term of payment," with the purpose on his part, expressed to government witness Herrick, of thereby enabling the funds received daily from P-D sales to accumulate to the point where they would cover the purchase price of the McCullough shares (R. 672). P-D "would then be virtually a holding company, owning 72,000 shares of American Beverage Company stock, and American Beverage Company would take over all of the assets except the stock, and assume all the liabilities of Prendergast-Davies"

[7] The two suppliers referred to were National Distillers Products Corporation and Seagram-Distillers Corporation (R. 182–183, 1298–1299).

(R. 672), including those left unpaid to enable P-D to purchase the ABC shares.[8]

This plan was carried out. On January 14, 1939, P–D completed payment of the $250,000 to McCullough for his shares, and received a transfer thereof (R. 131–132). On January 17 the annual stockholders' meeting of ABC was held. Petitioners and Clarke were present. Only four of the minority stockholders were present or represented (R. 137–140, 426). Feinberg was introduced by the chairman of the meeting, Avery (a director from the McCullough regime), as a man "skilled in the liquor business, and generally proficient" (R. 427), who "was to assume active personal control of the company" (R. 428). When government witness Connolly, representing a minority stockholder, inquired whether Feinberg was to receive the same $30,000 a year salary that had been paid McCullough, "the answer was that Mr. Feinberg was interested as an owner of this company primarily from the viewpoint of making a great deal of money for the company;

[8] Also, "Knowing what was going on during this time, the Kinsey Company advanced to Graves $52,000 for the withdrawing of whiskey from the Kinsey warehouses, Government taxes, freight, etc., and at the same time advanced funds to Graves for payment on account of notes maturing and interest charges and insurance, making a total, as I understand it, of a little more than $100,000. We were to receive reimbursement as soon as the merger was completed, the settlement date to be sometime between the 10th and 15th of February" (Gov. Ex. 30; R. 1252).

he was not interested in it as a salaried employee or any salary as such, and his principal interest and time was [sic] to be devoted to making the company successful" (R. 431). Feinberg presented a proxy to vote 70,500 shares (R. 141, Gov. Ex. 115, R. 1377); and the control stock forthwith elected a new board of directors consisting of Feinberg, Godfrey,[9] Clarke, Hughes,[10] Lipschutz,[11] Mintzer,[12] and Killian[13] (Gov. Ex. 43, R. 1271). Nothing was said at the meeting about acquiring the assets and liabilities of P–D (R. 433–434), and the minority shareholders were not informed that the new board would forthwith vote Feinberg a $30,000 salary (R. 431–432).

The new directors immediately repaired to Mintzer's office to hold a directors' meeting (R. 142–143). Upon the motion of Godfrey, Feinberg

[9] On January 27, 1939, Godfrey wrote Blass that "The only reason at this time that Vaughan [Clarke] and I are on the board of American Beverage is to see that things are worked out in the Graves situation that will strengthen this account on our [Kinsey's] books in every way and naturally we will keep you fully advised of all progress made in this connection" (R. 1367).

[10] Hughes was connected with Readville Distilleries, a large creditor of Graves, and had been asked by Feinberg about 10 days before the meeting to become a director (R. 547, 549).

[11] Lipschutz was the Pennsylvania sales manager for Graves (R. 1390).

[12] Mintzer was Feinberg's and P-D's attorney (R. 133, 609).

[13] Killian had been in charge of the soda beverage department of ABC (R. 113), and was the only hold-over director from the McCullough regime.

was given a five-year contract as president and general manager at $30,000 a year (R. 1272, 1278). Clarke delivered to Feinberg, as chairman, an offer in writing from P–D, signed by Feinberg[14] (R. 1272–1274). The offer proposed that ABC assume all of P–D's liabilities in consideration of P–D's transferring to ABC all its assets except the 72,000 shares of ABC stock, and of its causing to be transferred to ABC 81,429 shares of Graves stock (R. 1265). Annexed to the offer were the October 31, 1938 balance sheets of P–D and Graves. The offer stated: "We believe both of these statements to be true and correct according to the best of our knowledge and belief. * * * Due to physical limitations it has been impossible to bring the statements down to date,[15] but we are in a position to state that there has been no material change in the relative position of our assets and liabilities" (R. 1265). Feinberg stated at the meeting that he thought that the financial condition of P–D and Graves as of January 17

[14] All the necessary arrangements for putting through the proposal had been made before the meeting by petitioners and Clarke, and Mintzer had prepared the minutes of the meeting, reciting acceptance of the proposal, beforehand (R. 609–610).

[15] The evidence shows, however, that Feinberg had specifically instructed the employees of Graves not to prepare any monthly audits after October 31, 1938, although it had been the prior practice to do so (R. 753–754).

"might be better [than as of October 31] on account of the holiday business"[16] (R. 320, 392). The proposal was accepted by the new directors of ABC, on the basis that it "was highly desirable for this company and all its stockholders, and would make it possible for this company to do a larger and more profitable business in the future" (R. 1277). After the meeting 10-day notices were sent as required by law to P–D's creditors (R. 152–154, 233, 330, 993–994, 1317), who thereupon confirmed the sums owing to them by P–D (R. 1033, 1043); and the transfer of P–D's assets was consummated on January 27, 1939 (R. 1320–1324). Without waiting until the deal was consummated Feinberg, on January 18, 1939, compelled Killian over his protest to execute checks for $75,000 and $40,000 to the two distilleries which had permitted P–D's liabilities to them to accumulate pending the deal with ABC (R. 182–183, 672, 918, 920, 1298–1299).

Prior to this, ABC was in no need of capital financing, as shown by the fact that as of November 30, 1938, (*supra,* p. 9) its current assets

[16] The evidence shows, however, that between October 31, 1938, and January 27, 1939, the excess of P-D's current liabilities over its current assets had increased from $46,394 to $226,167 (R. 891–892); and that between October 31, 1938, and January 1, 1939, the net worth of Graves, *according to its own books*, had decreased from $157,078 to $72,597, the greatest single item in the decrease being a net operating loss of $42,720 for the "holiday" months of November and December (R. 903).

exceeded its current liabilities by $651,557.39. That it soon would be was obvious to Feinberg, who prior to January 17 had told Herrick, whose business was "the furnishing of working capital to companies who are doing a business beyond what their own capitals will permit them to do" (R. 643), that "even though American Beverage's cash position is good today, he [Feinberg] will have a shortage of working capital as soon as he has been in the picture for a little while" (R. 1358). By November 30, 1939, as reflected on its balance sheet and profit and loss statement of that date, ABC had suffered a loss, for the fiscal year just closed, of $235,618.83; its earned surplus of $166,109.07 as of the year before had been wiped out and there was a deficit of $91,260.32 in its paid-in surplus account; and the excess of its current assets over its current liabilities had been reduced from $651,557.39 to $195,223.90 (Gov. Ex. 61; Ex. Vol., pp. 86–88). By November 30, 1940, another year's operations had resulted in a further net loss of $507,019.62, in a paid-in capital deficit of $293,924.96, and in a reduction to $8,076.34 of current assets over current liabilities (Gov. Ex. 161; Ex. Vol., pp. 161–165). Herrick had begun financing ABC's operations as early as May 1939 (R. 708). The downward trend was directly attributable to the disparity between the assets ABC had received from P-D and the obligations it had assumed. In sum, the

liabilities that ABC assumed exceeded the true value of the assets it received by between $200,000 and $250,000.[17]

[17] As already noted (*supra*, p. 15, fn. 16), the balance sheets of October 31, 1938, did not correctly reflect, as Feinberg represented they did, the condition of P-D and Graves as of January 17, 1939. The evidence also shows that those balance sheets did not correctly reflect the net worth of P-D and Graves as of October 31. The balance sheet of P-D understated its current liabilities by at least $13,759 (R. 894). It included as current assets, under the heading "Notes Receivable," an item of $29,251.44 (R. 1267) which represented the stale notes of Feinberg, his brother Louis, and another employee. These were subsequently written off, almost in their entire amount, by ABC (R. 899–900), and should not have been carried as current assets of P-D (R. 908–909). A warehouse receipt item, representing bulk whiskey, which had been carried on the books as late as November 30, 1938, at its market value of $115,000 (R. 681), was written up on the balance sheet to a figure, which purported to represent cost plus carrying charges, but was $42,000 in excess both of cost (R. 679) and of market value (R. 895–896, 1004, 1056). On October 31, 1938, P-D's reserve for bad debts was arbitrarily written down by $30,000, thus increasing surplus by that amount (R. 897).

The October 31 balance sheet of Graves showed a net worth of $157,078.87 (R. 1263). On this basis 81½ percent of the Graves stock was taken by ABC at a valuation of $128,000 (R. 167). The Graves stock was shown, however, to have had no asset value at all (R. 904–908). An empty brick building, with a market value of not more than $9,000 or $10,000 (R. 463), was carried on the balance sheet at $81,987.36 (R. 1261), which figure included an arbitrary write-up of $38,553.96 carried on the liability side as "Capital Surplus, arising from revaluation of Fixed Assets" (R. 1263). Bulk whiskey was carried at $1,393,495.48 (R. 1260), which purported to represent cost plus carrying charges but exceeded market value by over $300,000 (R. 1005). From the Graves stock ABC got mainly lawsuits and liability for at-

In February 1939, unidentified newspaper publicity adverse to ABC (R. 196, 199, 209–210) and an awareness that in the negotiations "misstatements had been made" regarding Graves' financial condition (R. 199, 205, 206, 215, 559, 612–613) resulted in a series of meetings by ABC's board of directors. It was suggested that Feinberg "to protect the stockholders, deposit his stock as security" for any loss ABC might sustain on Graves stock (R. 559). On February 10, 1939, Feinberg entered into an indemnity agreement with ABC on behalf of P-D, whereby he agreed to deposit the 72,000 shares of ABC common stock to secure ABC against any loss it might suffer by reason of its acceptance of 80 percent of Graves' stock at a value of $128,000 (R. 205–206; Gov. Ex. 44a, R. 1288–1293).[18] Shortly

torneys' fees (R. 201–203, 223). It eventually received $20,000 for it in settlement of a lawsuit arising out of its sale to the Merchants Distilling Company (R. 222–223, 1054, 1071); and it also received $3,000 under an indemnity agreement from Feinberg to which reference is made in the text.

[18] Although the agreement undertook to secure ABC from any loss from Graves' stock, it further provided, *inter alia*, that if Graves had net earnings of more than $12,500 for any year on or before January 31, 1942, the collateral security was to be returned; that if ABC had average net earnings of $65,000 or more in the years 1939–1941, inclusive, the collateral was to be returned; that if liability resulted, it might be satisfied by installment payments over a period of years; and that P-D would retain its rights as a stockholder (Gov. Ex. 44a, R. 1288–1293). ABC suffered a net loss of $105,000 on the Graves stock (R. 223) but it only received $3,000 from Feinberg under the indemnity agreement (R. 221–223).

thereafter Feinberg resigned as president, but he retained voting control and remained with ABC as general manager at his $30,000 per annum salary (R. 190–191). An investigation of Graves' financial condition disclosed a serious situation (Gov. Ex. 50, R. 1307–1310).

ARGUMENT

I

The record refutes petitioners' contention (Pet. 15–22) that the prosecutor was guilty of prejudicial misconduct constituting reversible error. The matters upon which petitioners rely are (a) the references at the trial to John Torrio as Feinberg's predecessor in the operation of P-D; (b) the references to adverse newspaper publicity that immediately followed the taking over by Feinberg of ABC; and (c) the prosecutor's comments on the evidence in his summation.

A. The indictment described P–D as a corporation "organized by John Torrio, alias John T. McCarthy, in 1933," and alleged that Feinberg and his wife had acquired all its shares from Torrio in June 1935 and had controlled it since (R. 11). In reading the indictment to the jury the trial judge omitted all reference to Torrio (R. 1198). The first reference to Torrio in the presence of the jury was made in the unresponsive answer of the government witness Killian, a director of ABC both before and after Feinberg's assumption of control, to a proper question con-

cerning his knowledge of the general reputation of P–D[19] (R. 391). With the consent of the prosecutor the reference to Torrio was stricken from the record (R. 391). The next reference was while government witness Jacobs was on the stand. On direct examination Jacobs had shown that, according to Feinberg's prior testimony at a hearing before the Federal Alcohol Administration, his investment in P–D was $30,000 (R. 441). On cross-examination petitioner's counsel introduced in evidence Defendant's Exhibit E (R. 453, 1482–1485), which purports to be a contract between one William Slockbower and Anne Feinberg. On redirect examination Jacobs was then asked whether at the prior hearing Feinberg had disclosed "who were the real parties in interest under this transaction" (R. 454), to which Jacobs replied that Feinberg had testified that Slockbower was not a real party in interest; that his dealings had been with Torrio, who had told him that Slockbower was acting in Torrio's interest (R. 455, 456). Objection was overruled on the ground that petitioners' own counsel had introduced the contract in evidence (R. 455). Subsequently, after petitioners had sought through their witness Stempf to establish a good-

[19] The question was asked on redirect examination, after petitioners' counsel on cross-examination had gone into the witness' knowledge of P-D since its inception (R. 303, 314–317) for the purpose of showing that it had valuable good will.

will value for P–D by capitalizing its earnings for a five-year period that included the years that it had been operated by Torrio (R. 1127–1137), Stempf was asked on cross-examination: "Suppose the management as it then was in 1934 and 1935 had some peculiar power over the people that were in the liquor business, that he could exact the profit that he wanted, wouldn't that be an important factor?" (R. 1139–1140). Thereupon the trial judge stated: "It does not mean anything to me, and it does not mean anything to the jury;" the question was left unanswered; and the inquiry was not pressed further (R. 1140). The only further reference to Torrio was in the prosecutor's summation to the jury. We set forth the full passage in which it appears (R. 1172–1173), in order to show that it was directed not at Torrio's methods of operation, but rather to the fact that he had operated during the first lush years following repeal of prohibition and had left Feinberg but a small portion of the former capital:

> They had been building up this P–D. Here is such a wonderful thing. Let us look at that a little bit. This P–D Company represents an interesting picture. They gave you a story about this. There was a man by the name of Torrio; he was running the P–D Company. He wasn't doing at all badly back in 1934 and 1935. There was a profit, a good profit. Those were great years in the liquor business. It

is like when they come out with a new button; the first company that comes out with the new button, they do swell. You remember beer. There were a million beer companies; they all made money the first couple of years, and then gradually the good ones stayed and the bad ones drifted away. It is the same way in this business. And this fellow Torrio, he had something. He ran a business; he made a profit. I wasn't going to go into that, but they offered that contract here; they put that contract in, between Slockbower and somebody else; but the real guy was Torrio, not Slockbower. And it showed how they did it. And this is what they did. Torrio wanted to get out of the business for reasons that he had, and he said, "O. K. Have you got the money to buy me out?" Feinberg didn't have the money. He said, "I will tell you what. I will put up $30,000 out of the grand total of some $300,000, whatever it is."

And the way they worked it was that Torrio just lifted out all his working capital, some $250,000; he lifted it right out of there and left the shell for Feinberg. They had volume, that's right. Torrio built up the volume in 1934 and 1935. There was a shell left; and there was Feinberg scrambling with this shell trying to make a go of it—going downhill all the time—trying to get money out of it. * * *

It should be emphasized that no evidence was offered and no statements were made which either

(1) characterized Torrio in any adverse manner whatever, or (2) sought to "link" either petitioner with Torrio in any way as a business associate. The trial judge had never heard of Torrio (R. 58, 1243), and there is no evidence that any juror ever had. There is likewise no evidence that anyone connected with the case saw the articles in the New York Daily News of April 6 and 7, 1943 (Def. Exs. A and B of April 22, 1943; R. 1504–1506), in reference to present black-market operations reminiscent of Capone and Torrio days. Petitioners' own counsel did not know of the articles until after the trial had been completed (R. 1243). Thus, as the court below held (R. 1560), petitioners' contention is based on "the purest speculation." Moreover, as the trial judge pointed out, the evidence of the specific circumstances under which petitioner Feinberg acquired control of P–D "was brought in by the defendant[s], not the Government" (R. 1243); and the sole purpose of the few references to the Torrio regime, in the Government's evidence and summation, was to refute petitioners' attempt to establish a fictitious good-will value for P–D based upon the lush profits of that period. For this purpose the few references to Torrio upon which petitioners seek to predicate reversible error were, we submit, entirely proper.

B. Petitioners have informed this Court of a fact that nowhere appears in the Record, namely, that "On February 6, 1939, there appeared in the

newspapers an article to the effect that an indictment had been filed in the United States District Court for the District of Connecticut charging Feinberg with violation of the laws relating to distilled spirits" (Pet. 19). All that appears in the record with respect to newspaper articles [20] is that in February 1939 adverse newspaper publicity together with information concerning the real condition of Graves, led to Feinberg's resignation as a director of ABC,[21] to the appointment by the board of directors of a committee to look into the Graves situation at Boston, and to the retaining of the law firm of Breed, Abbott & Morgan to draw up the so-called indemnity agreement (*supra*, p. 18) for the ostensible purpose of protecting ABC against loss on the Graves shares (R. 196, 198, 201, 215).

[20] Petitioners, in stating (Pet. 20) that "The Circuit Court of Appeals, in its opinion, completely missed the significance of the newspaper article", have confused two matters that the circuit court of appeals and the trial court kept separate, namely, (1) the fact of adverse publicity and the reaction of petitioners thereto, and (2) the fact that Feinberg's prior liquor law violations resulted in ABC's having difficulty in retaining its basic liquor permit. The latter was charged as a part of the fradulent scheme (R. 16), but was not allowed to be proved (see R. 442–446, 1050, 1105–1106). As the court below held (R. 1555), there is no good reason why the troubles that Feinberg as a liquor law violator brought upon ABC could not have been proved, especially in view of the representations that were made concerning the altruism of his prospective management (see *supra*, pp. 12–13). Be that as it may, the fact that Feinberg was a liquor law violator, or that he was indicted for liquor law violations, was not brought out before the jury.

[21] Feinberg retained, however, his position as general manager at a salary of $30,000 a year (R. 190–191, 220, 278).

It was this testimony to which the prosecutor had reference in the portion of his summation (R. 1159–1160) set forth at page 20 of the Petition. Since the fraudulent scheme and conspiracy charged in the indictment embraced the period down to the time the indictment was filed, and included acts done after the acquisition by petitioners of the control of ABC, it was clearly competent for the Government to show the "scurrying-to-cover" that occurred in February 1939 and the reason therefor. As the court below held (R. 1556), since the articles themselves would have been competent evidence under the circumstances to show the reason for the subsequent activities, there was no impropriety in the prosecutor's allusion, in his summation, to the testimony concerning them (R. 1159–1160; Pet. 20).

C. The lack of merit in petitioners' contention (Pet. 21–22) that the prosecutor in his summation misstated testimony is apparent from a comparison of Connolly's full testimony (R. 430–432, quoted *supra*, pp. 12–13),[22] as distinguished from the single excerpt cited by petitioners (Pet. 22), with the prosecutor's remarks concerning it (R. 1155,

[22] In addition to the testimony of Connolly as set forth at page 22 of the Petition, Connolly also testified that he was told at the meeting of January 17 that Feinberg "was interested as an owner of this company primarily from the viewpoint of making a great deal of money for the company; he was not interested in it as a salaried employee or any salary as such, and his principal interest and time was [sic] to be devoted to making the company successful" (R. 431).

1161, 1171; Pet. 21). Such a comparison shows, as the court below held (R. 1560), that "the summing up did not misstate the testimony—in spite of what the accused say—; did not ask the jury to infer anything which in reason they should not."[23]

II

Petitioners contend (Pet. 23–24) that the court erred in admitting in evidence certain ABC financial reports for 1939 and 1940 (Gov. Exs. 61 and 161, Ex. Vol., pp. 82, 159). At the trial when the reports were offered in evidence, the sole ground of objection raised by petitioners was that they were not relevant to the charges of the indictment because they related to events occurring after the scheme to defraud had been executed (R. 267, 933). As the trial court recognized (R. 267), however, in overruling the objection, they were relevant to the conspiracy charge, which alleged that the conspiracy continued until November 19, 1941. As the court below recognized, moreover, "it was proper to show what the accused did with A. B. C. after they got possession of it" (R. 1560), in order to throw light upon the purpose of their previous acts.[24] This is quite different from "charging" the petitioners "with

[23] The trial judge gave the jury the usual instruction that its recollection of the evidence, and not that of the judge or counsel, was determinative (R. 1231).

[24] Petitioners themselves introduced testimony relating to events in 1940, 1941, and 1942 (R. 367, 380, 381, 384, 387).

the losses that occurred in 1939," as the prosecutor told the jury he was not doing (R. 1158; Pet. 23). He was careful to point out at the same time that "there is an importance in these figures for 1939 and for 1940."

The court below did not state "flatly that the admission of these reports was error" as the petitioners assert it did (Pet. 23); it "assumed" the point with respect to the report for the year 1940 alone and then asserted that, even upon this assumption, "it would be wholly unwarranted to reverse the conviction because of so trifling a single lapse in the course of so long a trial" (R. 1559). Far from asserting that the admission of the reports was "error", the court below correctly held that they "were admissible against all who were directors at the time" (R. 1559). Godfrey was a director of ABC until January, 1940 (Pet. 8); the date of Clarke's separation from that company does not appear. Evidence admissible against one coconspirator was admissible against all.

III

Petitioners contend (Pet. 25–27) that the trial court improperly received in evidence various books of account introduced as the books of P–D, Graves, and ABC, because the Government failed to lay a proper foundation by showing that the books were in fact the books of the corporations kept in the regular course of business. Peti-

tioners do not urge, however, that the books received in evidence were not in fact the books of the corporations kept in the regular course of business.

Whether such foundation was necessary depends (1) upon the effect of a stipulation entered into at the beginning of the trial and (2) upon the principle of the law of evidence upon which the use of the books at the trial was based.

Petitioners contend that the stipulation was narrower in scope than either the trial court or the court below construed it to be. In effect, their contention deprives it of meaning. The stipulation was entered into in the following manner: At the conclusion of the opening statements to the jury, the Government advised the court that the books of the corporations were present in the courtroom and that an inventory listing of them was available; the Government then suggested to petitioners the advisability of stipulating "that these books and records, as reflected on this list which I will hand to counsel, are the books and records so indicated of those companies;" and, after a discussion off the record, government counsel announced to the court that "counsel advises me it is stipulated that those are the books of the companies on this list, subject to verification." Petitioners' counsel neither denied the terms of the stipulation, nor sought to amend it in any manner. The books were marked for

identification, but were not offered in evidence until later in the trial (R. 85–88).[25]

Before the books were offered and received in evidence the government witness Grouls testified extensively concerning pertinent matters reflected in the books (R. 885–912). On one occasion when

[25] The colloquy at the beginning of the trial which resulted in the stipulation was as follows:

Mr. Rubin. If your Honor pleases, we have a large number of books and records of the three companies that are involved in this case. To save time, I would like to offer for identification the books that are on the table there, of which I have in my hand a list, with the understanding that they will be numbered consecutively for identification, and that the books and records will be marked during the recess tomorrow, so as to save the time of the Court and the jury and of counsel. Is there any objection to that?

Mr. Kleid. What books are they?

Mr. Rubin. They are the books of C. H. Graves & Sons Company, C. H. Graves & Sons Distillers, Inc., Prendergast-Davies Company, Ltd., and American Beverage Corporation.

Mr. Kleid. Are these only for purposes of identification?

Mr. Rubin. That is what I stated, Mr. Kleid.

Mr. Kleid. I just wanted to be clear on that; no offense. For the purposes of identification, I have no objection, provided these are all the books of the companies; I don't know.

The Court. If not, you can put in others if you want to.

Mr. Kleid. I do not know where they are.

Mr. Rubin. If your Honor pleases, I now suggest to counsel that they may wish to stipulate that these books and records, as reflected on this list which I will hand to counsel, are the books and records so indicated of those companies, subject to verification; the books and records will be in court, they will be available and they can be verified.

Mr. Kleid. I have no objection to these books being marked for identification. I am not familiar with these books, and, therefore, I am in no position to state now that these are the books of the company or all the books of the company, but for

petitioners contended at the trial that the books should be introduced in evidence before the witness testified concerning them, because otherwise there would be no showing that the books were the corporations' books kept in the regular course of business (R. 886–887), the trial judge reminded counsel that these matters relating to a proper foundation were covered by the stipulation (R. 887).[26] Thereafter when the books were offered in evidence petitioners objected to their admission "unless testimony is offered here to the effect that these books were kept in the regular course of business and are the books of the respective companies" (R. 913). The objection was overruled, however, on the ground that the stipulation had obviated the necessity for evidence in this respect, and the books were admitted (R. 913). Petitioners themselves made use of the

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the purpose of this trial, I have no objection to their being marked for identification.

Mr. RUBIN. If your Honor pleases, I am asking counsel whether counsel will stipulate——

The COURT. If you want him to stipulate, talk to him, but the jury is not concerned with this.

(Discussion off the record.)

Mr. RUBIN. Counsel advises me it is stipulated that those are the books of the companies on this list, subject to verification.

[26] The books being present in court and properly identified, there was, of course, no necessity for their introduction in evidence. *Stephens* v. *United States*, 41 F. (2d) 440, 444 (C. C. A. 9), certiorari denied, 282 U. S. 880; *Foshay* v. *United States*, 68 F. (2d) 205, 215 (C. C. A. 8), certiorari denied, 291 U. S. 674.

books in cross-examining Grouls (R. 934–986) and on one occasion they brought out the fact that the books were kept "regularly and properly" (R. 953, 965). At one point petitioners' counsel stated to the court that "nobody can dispute figures in the books, which I am not doing" (R. 970). In the light of this record, it is doubtful at best whether the petitioners are in a position now to question the admission of the books. Certainly their contention does not go to the actual fairness of the trial but attempts—invalidly—to invoke a purely technical point.

Petitioners' contention (Pet. 24–26) that the stipulation only related to the marking of the books for identification, in addition to being contrary to the construction placed on it by the trial court and government counsel, renders it entirely useless. Obviously no stipulation was necessary to simply marking the books for identification. The only plausible inference from the events recited above is that the stipulation was entered into by counsel on both sides for the purpose of saving time and avoiding the necessity of proving formal facts which petitioners were in no position to contest.

Even if a narrower interpretation is given to the stipulation than that of the trial court, it affords an adequate foundation for the reception of the books in evidence. As the court below points out (R. 1557–1559) the books are properly regarded as admissions by the petitioners and

their co-defendant, Clarke, covering periods of time when some or all of them were directors or officers of the corporations involved or for which they made representations with regard to the corporate affairs. It was not necessary to establish that the books were kept in the regular course of business as a foundation for receiving them as admissions, but only to establish that they were in fact the books of the companies. Wigmore, *Evidence* (3rd ed., 1940) secs. 1074, 1557; *Preeman* v. *United States,* 244 Fed. 1, 11 (C. C. A. 6), certiorari denied, 245 U. S. 654; *Taylor* v. *United States,* 96 F. (2d) 16 (C. C. A. 5). So much at least the stipulation clearly covered.

Petitioners argue that regardless of the competency of the books as evidence against Feinberg, those of P–D and Graves were not competent evidence with respect to the petitioner Godfrey (Pet. 26–27). The court below held that they were competent evidence against Godfrey, because he had vouchsafed for them by his participation in the submission of financial statements to ABC based on these books (R. 1559). In addition, however, the books were competent evidence against all of Feinberg's co-conspirators under the conspiracy count of the indictment. *Ilseng* v. *United States,* 120 F. (2d) 823, 826 (C. C. A. 9), certiorari denied, 314 U. S. 665; *Cornes* v. *United States,* 119 F. (2d) 127, 129 (C. C. A. 9).[27]

[27] Petitioners made no request that the evidence be restricted to that count and, therefore, may not now urge that the court erred in failing to so restrict it.

CONCLUSION

Petitioners had a fair trial and their convictions are adequately supported by the evidence. No question is presented which warrants review on certiorari, and there is no conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

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